United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ Affidavit of Mailing

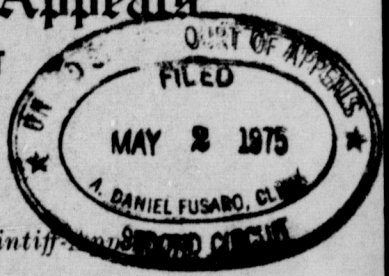
74-1622

To be argued by
CARL I. STEWART

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1622



LILLIAN WILLIAMS,
Plaintiff-

—against—

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CARL I. STEWART,
Assistant United States Attorneys,
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

PAGE

STATUTES

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1622

LILLIAN WILLIAMS,

Plaintiff-Appellant,

—against—

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal by plaintiff, Lillian Williams, from an order of the United States District Court for the Eastern District of New York (Bruchhausen, *J.*), entered March 20, 1974, in an action brought under Section 205(g) of the Social Security Act, as amended, (hereinafter "the Act") to review a final decision of the Secretary of Health, Education and Welfare (hereinafter "the Secretary") which denied plaintiff's application for child's insurance benefits under Section 202(d) of the Act, [42 U.S.C. § 402(d)]. The District Court's order denied plaintiff's motion for summary judgment and dismissed the complaint.

Statement of the Case

There is no substantial disagreement between the parties as to the material facts in this case. They may be summarized as follows.

On January 29, 1958, Geraldine Williams, the unmarried daughter of the appellant, gave birth in Midland, West Virginia, to a son, Wendall Lee Williams. Both the appellaut and her husband, James O. Williams, the child's grandfather, apparently expressed to both friends and members of their family an intention to adopt the child. However, approximately six weeks after Wendall's birth and prior to the commencement of adoption proceedings, his grandfather died. At the time of his death he was a fully insured individual within the meaning of the Act.

Wendall Lee Williams was legally adopted by the appellant in November of 1961, more than three years after the death of her husband. On October 18, 1967, application to the Social Security Administration for child's insurance benefits for Wendall were made which were denied. An evidentiary hearing before a hearing examiner resulted in the awarding of benefits to the claimant, but this decision was reversed by the Appeals Council of the Social Security Administration. This denial of benefits became the final decision of the Secretary.

The sole question on this appeal is whether the District Court was correct in denying the appellant's motion for summary judgment and dismissing the complaint.

Applicable Statutes

A child claimant's eligibility for benefits under the Act is governed by 42 U.S.C. § 402(d), which provides, in relevant part, that:

> (1) Every child (as defined in Section 416(e) of this title) of an individual . . . who dies a fully or currently insured individual, if such child . . .
>
> (C) was dependent upon such individual . . .
>
> (ii) if such individual has died, at the time of such death . . .
>
> shall be entitled to a child's insurance benefit. . .

Section 216(e) of the Act [42 U.S.C. § 416(e)], defines "child" as follows:

> (e) The term 'child' means (1) the child or legally adopted child of an individual . . .
>
> For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died . . .

Section 216(h)(2)(a) of the Act, [42 U.S.C. § 416(h)(2)(a)] provides:

> In determining whether an applicant is the child of a fully or currently insured individual for purposes of this title the Secretary shall apply such

law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application . . .

14 W. Va. Code § 48-4-1

(a) It shall be lawful for . . . any husband and wife jointly, to petition the circuit court or any other court of record having jurisdiction of adoption proceedings of the county wherein . . . they may reside, or the judge of such court in vacation, for permission to adopt any minor child, and also to petition for a change of name of such child . . .

(2) In the case of an illegitimate child sought to be adopted, the written consent, duly acknowledged, of the mother of such illegitimate child sought to be adopted must be obtained and presented with the petition . . .

(b) No petition for an adoption shall be made or presented until after the child sought to be adopted shall have lived in the home of the adopting parent or parents for a period of six months.

ARGUMENT

POINT I

The child claimant cannot be deemed to be the legally adopted child of the insured within the meaning of the Act.

In order for a claimant to be entitled to child's insurance benefits he must fall within the definition of "child" contained in Section 216(e) of the Act, quoted above. [42 U.S.C. § 416(e)] Since it is clear that Wen-

dall was not the natural child of the insured, James O. Williams, he may qualify for benefits only if he is "deemed" to be his legally adopted child. A child may be deemed to be the legally adopted child of a deceased wage earner who did not in fact legally adopt him during his lifetime if either (a) his surviving spouse adopted the child within two years of the wage earner's death or (b) the wage earner instituted adoption proceedings prior to his death. 42 U.S.C. § 416(e).

Since it is clear from the evidence in the record that the appellant, the wage earner's surviving spouse, did not adopt Wendall until more than three and a half years after her husband's death, Wendall may be deemed to be the legally adopted child of the insured only if proceedings for his adoption had been instituted by the insured prior to his death.[1]

It is uncontroverted that the only action taken regarding adoption by the insured prior to his death was to make inquiry at a courthouse in his home town. As the hearing examiner found, the Williamses were told by a clerk at that court that "adoption proceedings could not be commenced until the child had been a member of the household for at least 6 months." (App. 3), which he had not been. Thus informed, they returned home intending to commence proceedings at the expiration of the waiting period. Six weeks after the birth of the child, however, the insured had a cerebral hemorrhage and died.

---

[1] In apparent support of the proposition that the wage earner instituted proceedings for the adoption prior to his death, the appellant has quoted at some length from a letter written by General Counsel of HEW to the Appeals Council of the Social Security Administration. (Brief, 2-4). Questions of the weight to be accorded such an intra-office memorandum aside, this letter is clearly not properly before this Court as it was not part of the record below. Fed. R. App. P. 30.

To find that the informal inquiry constituted a "proceeding" within the meaning of the Act would be to torture the meaning of the word beyond recognition. Black defines "proceedings" as ". . . all possible steps in an action from its commencement to the execution of judgment." Black's Law Dictionary 1368 (4th ed. 1951). The word is elsewhere defined as "the instituting or carrying on of an action at law." Random House Dictionary of the English Language 1147 (1967). In the only decided case which could be found considering this statutory language, the court suggested that only an adoption proceeding *pending* at the time of the wage earner's death would satisfy the requirement. *Miles* v. *Finch*, 318 F. Supp. 1379 (E.D. Mich. 1970).

Ultimately, the test of whether a proceeding has been commenced must refer to the law of the domicile of the wage earner. Under West Virginia law, proceedings to adopt a child are commenced by the filing of a petition with the appropriate court. 14 W. Va. Code § 48-4-1. In addition, West Virginia requires that "no . . . [adoption] petition shall be made . . . until the child . . . shall have lived in the home of the adopting parent[s] for a period of six months." 14 W. Va. Code § 48-4-1(b). Not only was no proceeding commenced under West Virginia law during the wage earner's lifetime, but none could have been as he died prior to the expiration of the statutory waiting period.

Accordingly, the conclusion which must inexorably be drawn is that neither of the statutory requisites for a timely legal adoption were met in this case.

POINT II

There was no "equitable adoption" of the infant claimant so that he could be deemed a "child" under the first definitional clause of § 416(e).

A child claimant may qualify as a "child" (rather than as an individual deemed to be a "legally adopted child" because he was legally adopted by the surviving spouse) if by the time of the wage earner's death, the latter had "equitably adopted" him. Thus, on the facts of the instant case, if the insured had "equitably adopted" the infant claimant before March 11, 1958 (the date the wage earner died), the "child" status requirement would have been met. *Meadows* v. *Richardson*, 347 Supp. 154 (S.D. W. Va. 1972).[2]

In this case, the Secretary was constrained to find that the "equitable adoption" doctrine was simply not sufficiently elastic to allow the granting of benefits to this infant claimant. (See decision of Appeals Council, App. 12).

It has been said that the ingredients necessary to apply the doctrine of equitable adoption are a written or oral agreement showing the intention of the parties to the adoption, proof of the agreement by clear, strong and satisfactory evidence, and consideration. *Davis* v. *Celebrezze*, 239 F. Supp. 608 (S.D. W. Va. 1965); *Smith* v. *Richardson*, 347 F. Supp. 265 (S.D. W. Va. 1972). In addition to the rather strict standard of proof required to show an equitable adoption, the test is satisfied only if under the law of the wage earner's domicile at the time of his death, the child would

---

[2] Although the concept of an adoption in equity is not explicitly recognized by the Act, both the Secretary and courts have evolved the concept of equitable adoption for benefit purposes absent strict compliance with statutory requirements. That concept, however, does not intrude within the strict confines of the phrase "legally adopted child" in § 416(e), but simply as an elastic ingredient of the word "child."

have the right to inherit from the adoptive parents. 42 U.S.C. § 416(h)(2)(A); *Hayes* v. *Secretary of Health, Education and Welfare,* 413 F.2d 997 (5th Cir. 1969).

The facts in this case simply do not support a finding of equitable adoption by the insured. As mentioned above, West Virginia law imposes a six-month waiting period before adoption proceedings can be commenced. Furthermore, property could not pass to the child by intestacy or otherwise during this period. It is only after the entry of a *decree* of adoption that an adopted child may inherit from his adoptive parents. 14 W. Va. Code § 48-4-5.

Although the doctrine of equitable adoption rests on a salutary principle, the contract to adopt was here not frustrated by the mere failure to fulfill some technical step in the West Virginia adoption process which equity should remedy, but rather by impossibility of performance. Thus, in a case virtually on all fours with this one, the wage earner died prior to the waiting period for adoption imposed by Ohio law. In denying benefits, the court held that since the adoption could not have been effected prior to the wage earner's death, no equitable adoption could result. *Spiegel* v. *Flemming,* 181 F. Supp. 185 (N.D. Ohio 1960).

CONCLUSION

The order and judgment of the District Court should be affirmed.

Dated: May 1, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CARL I. STEWART,
Assistant United States Attorneys,
Of Counsel

STATE
COUNT
EASTER

deposes
District
That

by placi

and dep
drop for
of Kings

Sworn t
2nd

★ U. S. Government Printing Office 1975— 614—250—102

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of May 19 75 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Rudes & Schatz, Esqs.
149 Broadway
Lynbrook, N. Y. 11563

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
2nd day of May 19 75

Juanita Mayo

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1977